UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Allegheny County Employees' Retirement System,	.	Docket #CV-20-200 (GAM)
Plaintiff,	.	
	.	United States Courthouse
	.	Philadelphia, PA
vs.	.	July 8, 2022
	.	10:00 a.m.
Energy Transfer, LP, et al.,	.	Via Videoconference
Defendants.	.	

TRANSCRIPT OF ORAL ARGUMENT HEARING
BEFORE THE HONORABLE GERALD A. MCHUGH
UNITED STATES DISTRICT COURT JUDGE

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THE COURT: This is the Allegheny County Employees' Retirement System, et al. versus Energy Transfer, LP, et al., Civil Action 20-200. And would the counsel for Plaintiffs please identify themselves?

MR. BROWNE: Good morning, Your Honor. This is John Browne from Bernstein, Litowitz, Berger, and Grossmann on behalf of the Plaintiffs. I'll be doing the argument today. And I would just -- I don't want to interrupt everyone's introductions, but I do want to extend a very sincere thank you to Your Honor, the court personnel, and defense counsel for accommodating me. After two years of dodging it, I got COVID at the end of last week and was not supposed to be around people and was still testing positive. So I was greatly looking forward to being in a courtroom. But I do thank everyone for that accommodation.

THE COURT: You're welcome. And I'll note for the record that the parties have agreed that we can proceed by Zoom argument today. And with that, I'll turn to counsel for defense to identify themselves, please.

MS. MCNALLY: Good afternoon, Your Honor. This is Laura McNally from Morgan, Lewis, and Bockius, counsel for Defendants. I'm joined by my colleagues Mark Sonnenfeld, and one of our summery associates, Maria Cosmo's, on the line as well to observe these proceedings. And then our colleagues from Vinson and Elkins will be handling the argument today.

Vinson and Elkins, your video's not on so I don't know if you're experiencing some technical difficulties you guys have -- oh, now you're on, okay, good. So I'll let them introduce themselves.

MR. RITCHIE: Okay, good. Yeah, I hope everyone can see me. This is Robert Ritchie from Vinson and Elkins for the Defendants. And I'm joined here by my partner Michael Holmes.

MR. HOLMES: Hello, Your Honor. It's nice to see you.

THE COURT: Good morning. It appears you're standing at a podium in a very formal courtroom setting.

MR. RITCHIE: That's right.

MR. HOLMES: Yeah. Not quite --

THE COURT: You --

MR. HOLMES: -- the same as being there but you know.

THE COURT: All right. Well, you get points then for production today.

All right. So this is Plaintiffs' motion, so that would say to me that, Mr. Browne, you would have the laboring oar if you want to get underway.

MR. BROWNE: Yes, I will. Thank you very much, Your Honor. As you noted, we're here on Plaintiffs' motion to certify the securities case as a class action. And this is somewhat of an unusual class certification motion because

Defendants have conceded almost all of the requirements of Rule 23(a) and 23(b)(3) that plaintiffs normally bear the burden of having to prove, you know, elements such as numerosity, common questions of law, typicality, and adequacy.

So the only issue in dispute on this motion is whether the Defendants have come forward with sufficient evidence to carry their burden of showing that none of the alleged misrepresentations that have been sustained in the case had any impact on the price of Energy Transfer common units during the class period. I do believe that just by force of habit, at times during the argument I may say stock price. If I do, I'm referring to the Energy Transfer common unit price which is a security and it did trade on the New York Stock Exchange during the class period.

So to carry their burden in this case, as Your Honor knows, the Defendants have to show by a preponderance of the evidence, both that there's no front end price impact associated with any sustained alleged misrepresentation at the time it was made and there was no backend price impact when the truth was allegedly revealed on what Plaintiffs claim were six separate alleged corrective disclosures dates. This is a difficult burden for the Defendants to carry, and I respectfully submit they have fallen well short of doing so here. And I am going to address everything or most things in some detail. But at the outset, Your Honor, I would like to

just take a quick step back and sort of make three broad points that I believe highlight just how high the mountain is that Defendants have to climb in this case. And the first point I want to make in that regard, and in a general matter, is this is a rare case where the Plaintiffs have strong evidence of frontend price impact, at least for some statements.

While we are proceeding on a price maintenance theory, for many of the statements in the case there is particularly strong evidence that there was frontend price impact for the statements made during Energy Transfer's third quarter 2017 conference call on August 9th, 2017 where both parties' experts agree that following that conference call there was a statistically significant increase in the price of Energy Transfer common units.

And under Defendants' own logic, this statistically significant and immediate price increase is very powerful evidence of price impact. They have some arguments against it which I will address in detail. But just the fact that that exists here makes -- is unusual, honestly, in my experience, and really bolsters Plaintiffs' arguments for showing price impact. That's one.

And then, second, the backend price impact here in many ways is strong as well. There are six alleged corrective disclosures. Each one resulted, all six of them resulted, in

substantial price declines. Every single one of them are associated with a negative excess return, which means that the negative decline following the disclosure cannot be explained by independent -- or is not explained by independent market or industry factors as those were excluded. Out of those six, two of them showed a statistically significant decline to the confidence level of 95 percent and 99 percent, respectively, within one day, which is very strong prima facie evidence of price impact. With the remaining disclosures, Your Honor, three of the remaining four showed statistically significance price declines within two or -- in one or two cases within three days of the alleged corrective disclosure.

In the instances where it took more than one or two days to reflect the statistically significant price decline, we believe there are very plausible, common sense, and compelling explanations for why that happened. And Defendants have failed to rebut the backend price impact.

Finally, again at a very high level, when you think about this motion and the arguments at stake here from a real world perspective, when you take a step back from the "T" statistics, the two or three-day event window, whether what caused an excess or abnormal return, and you sort of put the parties' competing paid experts and their scientific evidence aside for a second, what the Court is really tasked with doing is applying what the Supreme Court recently referred to as a

good dose of common sense to the questions on this motion. And in doing so, the Supreme Court made clear that the Court should be open to all probative evidence on the question, qualitative as well as quantitative, and evaluate that evidence with common sense in mind. And I do believe and submit that when you think about this motion from a common sense perspective, it really highlights how difficult the burden is that Defendants have to surmount.

Because what Defendants are trying to say and what they have to say and they have to prove by a preponderance of the evidence to win, to defeat class certification here, is they have to show that the market didn't care when Energy Transfer repeatedly made statements on conference calls and in SEC filings and in response to analysts' questions about a critically important pipeline project that the company talked about during almost every single one of its conference calls during the class period; where the CEO, Kelcy Warren, talked about it; where the other high-ranking executives directly talked about it; or analysts repeatedly asked questions about it during conference calls, and analysts repeatedly specifically wrote about the pipeline in the reports during the class period.

Defendants are trying to say that none of those statements had any impact. Even if they're false, right, Defendants have to show that now that none of those statements

had any impact on the price of Energy Transfer common units. Defendants also have to show, you know, in comporting with common sense that the market didn't care either when some really astonishing disclosures were made during the class period, disclosures such as: this very important pipeline project would be delayed; it would have 65 percent less capacity initially than when the market had been told; that the Pennsylvania Department of Environmental Protection had identified dozens and perhaps hundreds of environmental and permitting issues, leading it to issue a stop work order on the pipeline; that the FBI and the Chester County District Attorney had initiated criminal investigations into ET's conduct in connection with the pipeline; and that ET employees and related contractors had actually been arrested in connection with their conduct to the pipeline.

So Defendants have to -- to win here, Defendants have to say none of that mattered. It happened, sure, we lied about it, sure, but the price just didn't -- it was never -- none of those things really ever impacted the price of Energy Transfer common units. And that I don't think really starts off from a common sense perspective. And, again, illustrates how hard it is for Defendants to win on this motion. And I want to just draw another contrast, you know, between this case and some cases that I've certainly been a part of litigating in the past, Your Honor. And I think, you know, it's another reason

that you'd expect me to say, that I think price impact is demonstrated more easily here than in some cases. The backend disclosures that we're relying on really all -- in addition to being, as I said, sort of astonishing disclosures in some ways, they all almost much more relate -- they much more directly relate to the core allegations of Plaintiffs' case than in some cases that we see.

And, for instance, I'll just draw a comparison. This isn't a case where we're saying there wasn't an earnings announcement and they said that they didn't hit their earnings per share guide, and we find out two months later that that's because a channel stuffing (indiscern.) had stopped but the earnings announcement itself didn't mention the channel stuffing. That actually would be sufficient, and that would prevail. But that's a little bit more attenuated than the disclosures that we have alleged in this case which time and time again relate directly to our core allegations of environmental violations, permitting improprieties, code of conduct violations, and timeline and throughput statements about the pipeline.

They really do square up quite nicely which, again, you know, I wouldn't say in that -- in such an instance it's impossible for Defendants to establish a lack of price impact, but it shows how difficult it is to do here. And in response to all this, Defendants -- and this is really notable as well

at a high level. Defendants, in almost very case, they don't points to another reason why the Energy Transfer common units declined in price in response to the -- there's a couple areas of disagreement on this.

But as a general matter, they don't say, for instance, well, the reason why it fell by a statistically significant amount two days after your alleged corrective disclosure was because another pipeline of ours was shut down, or the cryptocurrency market had collapsed and -- or Ukraine and Russia had gone to war. They don't say that. They don't -- they sort of -- their answer to most of the Plaintiffs' evidence is to short of shrug and say, well, who knows. It wasn't what you say, Plaintiffs. But, yeah, statistically significant, I don't know. But who knows and a shrug isn't sufficient to carry the burden they face on this motion.

So with those frontend, backend, and sort of common sense principles in mind, Your Honor, I would turn, if you would like me to, to some of the specific disclosures and arguments in the motions.

THE COURT: Proceed.

MR. BROWNE: Okay. Thank you, Your Honor. So generally pervading this entire dispute between the parties are some sort of disagreements I think about some important concepts and statistics and how the law applies statistics to these cases. And we do have statistically significant drops.

As I said, in two instances on the same day. And in three of the other five instances within two or three days. But even if we didn't have those, the -- it -- we could still prove -- you know, it doesn't mean that we could not prove price impact. There's no support really in the law for the notion that you have to have a statistically significant price impact, you know, either immediately or within two or three days. We could have none at all and we could have evidence of price impact that would include things like, you know, abnormal excess returns, which we have here, you know, the absence of any other news to explain the decline.

This isn't a case where the price stayed the same after corrective disclosures or rose and we're trying to say, you know, would have -- it would have risen less or it would have dropped if, you know, but for the news. We actually have drops on each stock.

So even if we didn't have to -- even if we couldn't show statistical significance it would be impossible for us to prove price impact. And --

THE COURT: But you agree that it's meaningful evidence and you would agree that in most cases like this there is evidence of that statistically significant impact, correct?

MR. BROWNE: I would agree with that, Your Honor. And as I noticed, we do have it here, so part of my argument,

you know, I'm just making a broader point. But I would agree with your statements absolutely. But there is a reason why statistical significance isn't the be-all and end-all of everything that the Court or the parties have to look at, setting aside the fact that the Supreme Court has said you have to look at other things. Just because a stock price drop cannot be ascribed to like a 95 or 99 percent degree of confidence of statistical competence to a disclosure, that does not rule out -- it's a basic truism of statistics. That does not rule out that the stock drop could have been caused by that disclosure. It doesn't. And I think the Monroe County case or the Southern Company case we cited both ways in our papers from Georgia really got into these issues in a sophisticated way.

An example in that case that I found helpful to me in understanding some of these issues was they said -- the Monroe County court was quoting the plaintiffs' expert in that case said, well, if you're trying to determine whether a lake or a pond has fish in it, you can go to the pond and fish. If you catch a fish, yes, the lake definitely has fish in it. If you don't catch a fish, you haven't proved that the lake doesn't have fish. And while that's simple, it's actually a pretty consistent analogy with what statistical significance means.

All the statistical significance means is that if you can show it, then it must be due to disclosure. But if you can't

show it, that doesn't rule out that it was due to disclosure. Okay. So --

THE COURT: I recall a footnote in the defense brief saying that particular example is fishy. But I'm sure they'll get to that in rebuttal.

MR. BROWNE: Yeah, well, I -- that -- I'm sure they believe that. But it is -- but there really can be no good faith dispute about the (indiscern.) statistical concepts that the Monroe County court discussed and what I said here. They -- that is the reality. And I think no expert would disagree with it.

So when you look at thee excess random returns, negative returns -- I'm setting aside statistical significance again -- but that we have for each of the six corrective backend disclosures, you know, another footnote or maybe a major argument in Defendants' briefs on these points was, well, because it's not statistically significant, you can't rule out randomness, right?

And that's true, you can't rule out randomness. But you can't rule out -- you also can't rule conclusively that it wasn't caused by the drop. So I'm not -- at best, that gets everyone to 50, 50 I think because no one can rule out anything. And someone has to rule out something to win this motion. And by that someone I mean the Defendants. So --

THE COURT: So you'll settle for equipoise.

MR. BROWNE: I would settle for equipoise, but I think I could do a lot better, I hope. But I would settle for that because that would -- Defendants wouldn't have carried their burden. And I will make one larger point on this randomness argument, too, again stepping away from the statistics. If it was random, Your Honor, it was random six times negatively, okay? It wasn't random three times positive and three times negative, and random one time didn't move. You know -- and, again, I apologize, my calendar (indiscern.). And, you know, it was random every single time in a downward motion (indiscern.). I'm really sorry for that. Give me one second. I'm going to snooze for eight hours because I think we'll probably be done with it.

So that's the randomness, you know, point. When you think about that, maybe it was random. But it was random in Plaintiffs' favor six straight times and never in Defendants' favor. So that's another large point. And then again, Your Honor, and I don't want to belabor this, though I'm happy to talk about it, but just a fundamental failing of Defendants' arguments, you know, is this notion that it absolutely as a matter of law has to be -- statistical significance has to be tested with a one-day window, that a one-day event window is the only thing that Plaintiffs get, and if they don't get that they lose. Now, we have that for two of them, as I said, and we have them for the frontend price impact disclosure.

But, you know, as we lay out in our briefs, and I won't really repeat it unless you want to but, you know, multiple courts, including courts in the Third Circuit, have recognized the propriety of looking at least in certain instances at two or three-day event windows. And the academic literature that is cited, you know, by courts, and even by the parties experts', also recognize that two, three, and sometimes even five-day event windows can be appropriate.

So this sort of fictional constraint of, oh, you can't show statistical significance in one day, you lose, isn't the law. The Defendants have -- their best case on it is Halliburton II on remand, which is in Texas, which may be why they wanted to go to Texas in the beginning. But that case has not been widely followed. And there's many, many more cases, including all the cases in the Third Circuit, which recognize that you can look beyond a one-day window and should look beyond a one-day window.

THE COURT: Each side relies heavily on one district court case, you on Monroe County and them on the Halliburton II remand.

MR. BROWNE: That --

THE COURT: Let me ask you this, though. Would you agree that as you get further out from the one-day window, it becomes important, not even just as a matter of law but as a matter of common sense and evidence, that there needs to be

some explanation as to why an effect would not have been shown immediately?

MR. BROWNE: Absolutely I would agree with that, Your Honor. And what I was going to say when you started asking the question was that you -- exactly that. You -- if it -- the farther away you get, I think Plaintiffs do need to point to some reasons why. You know, and we do here, and I want to go through those.

I think we have some very clear explanations for why, including, in some instances, Defendants' own intentional obfuscation and confusion of the facts. But I think we can point to plausible and compelling reasons why in those couple instances where it took a few days that it did so. So, yes, I would agree with your statement. I think we could satisfy that.

THE COURT: All right.

MR. BROWNE: So -- I'm sorry.

THE COURT: No, continue.

MR. BROWNE: Oh, okay. So, Your Honor, I mean, with that I think I might turn a little bit -- in a little bit more detail to the -- to addressing directly the arguments on both sides of the front impact --

THE COURT: All right.

MR. BROWNE: -- piece of the case, the August 9th, 2017, I think it's third quarter, conference call. Several --

the Court sustained several false statements, you know, as correctly alleged at least arising out of that conference call. There are false statements such as a revolution project construction is scheduled to be complete. And there were really -- there were statements about the revolution project and when it would be up and running for the most part.

So Defendants agree, and our expert agrees, and everyone agrees here that there was an immediate 5.69 percent statistically significant excess increase in the price of Energy Transfer common units following that conference call. Normally game over really for frontend price impact. But what Defendants say is, well, no, it's not game over because we're going to tell you, we've read some analyst reports with our expert and the reason why the stock rose that day, a hundred percent of the reason, Defendants made no effort to disaggregate anything, they just say a hundred percent of the reason was because the company had better than expected earnings and had announced that it wasn't going to engage in a continuing course of mergers and acquisitions which it had been doing for several years.

And the market rejoiced about those things, Plaintiffs, the market, it didn't care about the timeline of the pipeline. I'm telling you that's all that mattered. But it -- as a threshold matter, without any economic analysis to disaggregate the impact of the statements the Defendants claim

were false and inflated the price of Energy Transfer common units on that day, Defendants can't carry their burden by just saying that, by just having their expert read some analyst reports.

And when you look at the analyst reports, that becomes clear because that -- their reading (indiscern.) reports is too cribbed. And, for instance, when their expert, Dr. Allen, says that the market was only concerned about the lack of M and A projects, we point in our briefs to multiple analyst reports that came out afterwards that connected that lack of M and A activity with a rejoicing of the fact that the company was going to focus on the pipelines and organic growth projects.

So when those analyst reports -- and in one instance Ms. Allen actually omitted a sentence from a block quote that talked about the growth projects. But when you look at that, when you look at the analyst reports, for instance on August 11th, 2017, Wells Fargo issued a report that said another change, talking about a conference call, with management's posture and corporate M and A because: "Management noted that its focus is currently on project execution and guiding Energy Transfer's sizeable project backlog to completion rather than M and A."

So Plaintiffs have certainly plausibly alleged that that lack of M and A activity was definitely, you know, as

perceived by the market contemporaneously to be associated with the pipeline. And, therefore, Plaintiffs at this stage have certainly adequately alleged frontend price impact with those alleged misstatements -- with respect to those alleged misstatements relating to the pipeline.

So one other argument that Defendants make, and it really is a bit of a hail Mary, they kind of claim in their sur reply that our expert conceded that there was no frontend price impact on that date. He didn't concede that. What he actually said was that, you know, Dr. Allen, their expert's own analysis shown a statistically significant price increase strongly supports Plaintiffs' arguments. And (indiscern.) Plaintiffs are not conceding it. We believe the price impact for those statements.

Now, a couple of the backend corrective disclosures, for lack of a better word, that I think might benefit from being addressed a little bit directly by me here in this argument, Your Honor. I want to -- and maybe I won't do all of them but let me just do a couple at least. And I'm going to focus -- well, let me just go for it.

So I want to start with, you know, the August 10th August -- through August 13th, 2018 statements which we have characterized as corrected disclosures. The disclosure about the Franken pipe where the 20-inch pipe was going to be combined with a 12-inch pipe in certain areas as a workaround

because of environmental and permitting problems that the company had come up with.

So the basic facts around this are on August 9th, there was a disclosure at a conference call that the company was going to do a 12-inch pipe. Defendants make an argument that might have been disclosed earlier, too. It's irrelevant for my points here. It was either disclosed on August 9th that there's a 12-inch pipe or vaguely at some point earlier. What the market -- okay. There was no price drop on August 9th. Okay.

On August 10th, analysts issued reports, new reports, after analysts had contacted the company and said we have internal documents already where the company -- where the analyst said, I'm confused by your statement about the 12-inch pipe, what did it really mean. I'm paraphrasing obviously. So after some conversations, private conversations, with the company, analysts issued new reports on August 10th which we contend for the first time made clear to the market or started to make clear to the market that this Franken pipe workaround was actually going to cause a substantial reduction in the initial capacity of the pipeline.

And, in fact, the Defendants soon admitted that it would be 65 percent less than they had represented before because you can't fit 20 inches of natural gas through a 12-inch pipe, so it was going to be reduced. The market just didn't

understand that based on Defendants' statement on August 9th. It didn't understand that based on any other statement Defendants could point to earlier in the class period because it was confusing. And it's not me or my expert looking at this and just telling you it was confusing. We have analysts themselves who came out and said that -- and by the way, Your Honor, I just -- I should note, August 10th is a Friday.

So when we go to August 13th, which to complete the timeline there's a statistically significant drop, no dispute by anyone on August 13th, it's not five days. It's at best three trading days under Defendants' argument, the 9th, the 10th, and the 13th. But really it's two trading days because we say the true disclosures came out on the 10th when the analysts clarified the August 9th drops. And, Your Honor, so two things happened on the August 9th disclosure. It confused the market, which multiple analysts directly said in their reports on August 10th, that they were confused, and it had to be clarified. The law -- there's strong support in the law for instances where the market was initially confused by a statement that later had to be clarified that the -- that it can take longer to see a statistically significant price reaction.

So this is one of those instances we're going back to the beginning of the argument, Your Honor, where there was a longer delay between the alleged disclosure and statistical

significance, but we have an explanation for that that is really quite plausible because it's not even us saying it, it's analysts saying it, okay? And then another thing that supports this is we think the Defendants themselves, and we think we'll be able to show it, continued to mislead the market on -- about the true meaningful impact, the capacity

And we point in our brief to some documents that we've obtained during discovery where Lisa Dillinger, who's the spokesperson for Energy Transfer, on August 9th, she got a call from a reporter who said, I want some -- I want to clarify your remarks about the pipeline today. You said that you expect the full 275,000 capacity on ME2 to be up in the third quarter of 2019; is that correct? And the spokesperson for Energy Transfer responded, we will have it in service using a combination of pipes by the third quarter, and added, this will allow us to flow the majority of the capacity. That's simply misleading. A 65 percent reduction is not the majority of the capacity.

So that happened on August 9th and contributed to the confusion that the market had. And this is reflected in the August 10th research reports which directly criticize -- the Wolf (phonetic) report directly criticized Energy Transfer for its confusing discussion the prior day, noting that its transparency and disclosure on this project was very low. And a Wells Fargo report on the same day came out and said the

earlier statements: "confused the market."

So we have evidence, we have explanations for why this happened. And then the final point I want to make on this -- and, you know, I find myself making this point on a lot of Defendants' -- in response to many of Defendants' arguments about our backend corrective disclosures, this is the shrug situation again. You know, they'll throw their hands up. The Defendants, they don't even analyze August 13th. They told -- they clearly told their expert, don't look at August 13th. Their expert didn't look at it. They say they have no explanation for why things did go down on August 13th to a statistically significant degree if, as they say, it wasn't the news that we claim that came out on the Friday, August

So a shrug, and I'll throw my hands up in the air, and say, "Who knows?" If not -- you know, not in all -- I'm not standing here saying in all instances, Defendants have to explain exactly why everything happened. But it sure would help their case when you're weighing -- you're weighing the parties' competing arguments here. If Defendants could say, "Well, no. No one cared about the (indiscern.) August 10th because it was (indiscern.) August 13th, what happened was X." But instead they just said, "No. Don't look at August 13th. We have to stop." And if they really had a winning argument or an argument that was right, in my view, they would have looked at August 13th and explained it. But that sort of

willful blindness doesn't help them carry their burden here. One other back-end disclosure that I want to talk about, Your Honor, is the -- and this is a little bit of an odd one -- the October 29th disclosure, from the Pennsylvania Department of the Environment, issuing a stop-work order on the pipe project.

So there's a statistically significant decline again -- no dispute between the parties -- on October 29th. The dispute here is kind of -- is very factual, a little bit unusual. The Defendants claim, "Well, again, I don't know why the stock dropped on October 29th, but it couldn't have been this stop-work order because that wasn't issued until October 30th, and the market didn't know about it until October 30th."

And they point to like a Freedom of Records request that they made, from Pennsylvania, that said, "Can you -- do you have any evidence of an October 30th press release distributing the DEP order being distributed earlier than October 30th?" Well, by definition, no. You don't have an October 30th press release distributed earlier. So they got no response to that. And then they also rely on the Westlaw search that they've constructed to claim that -- to claim that the order was first put on Westlaw on October 30th.

But, you know, maybe -- maybe Defendants have raised some questions about that. But they -- they're not very convincing. Because what Defendants fail to admit is the

order is -- the order itself is dated October 29th. And if you look at -- you don't have to look at it now. But just for the record, I'll note Exhibit 17 to our reply brief, "Internal documents from the VEP show the order being sent to Defendants, at approximately 1:00 o'clock in the afternoon, on October 29th." So the order was absolutely sent outside of Pennsylvania Government circles on October 29th because it was sent to the Defendants.

So there's two different versions of the press release that's in dispute on Westlaw. One says, "October 30th." You know, one says, "October 29th," according -- you know, according to us. That version is from State Street News Service. It's Exhibit 19 to our brief. So there's a fact dispute here about when that order came out. Well, not really. The order definitely came out on the 29th. There was a fact dispute about when the market started to learn about it. And I would say in all candor, there's some evidence on both sides, but certainly not enough evidence for Defendants to cut off the plausible and reasonable inference from the fact that this astonishing software order was issue, which is that the marked did learn about it on October 29th.

THE COURT: They also put some emphasis on a Post-Gazette article that was published in advance of the 29th. And at least as I look at the tea leaves, there might have been some impact from that. But it doesn't seem to be

where you're grounding your claim. How does that fit into the mix in your view?

MR. BROWNE: My view, Your Honor, that fits into the mix as either way, we win. And here's why. So that Post-Gazette article that you're talking about was first published, according to Defendants -- and I'm not even disputing it. But I don't -- Defendants raise that it was first published, I think, on October 21st, okay? And then it was re --

THE COURT: (Inaudible).

MR. BROWNE: -- republished -- no. But you were right as well. Then it was republished on October 27th. And we did point to the October 27th republication in our -- in our complaint. But Defendants say, "Well, just a republication of something a week later couldn't possibly have -- have moved the stock price," you know, according to all of the other arguments that they make in the case.

But the way that I would -- and we're relying really on the DEP order to prove this -- to prove this drop here. Although, if the -- the way the -- to answer Your Honor's question directly, I hope -- the way that I would characterize how that October 27th republication of the article fits into the case is that, if that caused the stock price drop on the 29th, that relates to our claims as well. You know, it's all about environmental and permitting disasters and issues of the

company. So if that caused stock price drop on October 29th, then we also have price impact.

THE COURT: I also, in this subchapter or our drama, recall a subplot. And the subplot was a possibility of the leak of the DEP memo. And but it --

MR. BROWNE: Yes. Well, but --

THE COURT: Hold that thought. Because so you say, well, the Courts -- it's always possible, quote, unquote, that there was a leak. And Courts have recognized that leaking is a way that things can get to the market. But how does possibility fit in the burden shifting framework that I'm implying here, right? I mean, you say, "Okay, could have been leaked."

MR. BROWNE: Yeah.

THE COURT: Do you say, "Well, because they have the burden of persuasion at this point, it's on them to rule that out"? I'm just -- I'm not 100 percent sure, from Plaintiffs' side of the table, how their putting that leak theory out there.

MR. BROWNE: Yeah. No. That's a very good question. So here's how I would put it out there. We're not just saying, "It could have been leaked." We're saying that there is a version of it on my cell, located October 29th. We are saying there was a statistically significant stock drop on that day that no one has any explanation for other than what

we've pointed to. You know, I guess -- suppose it could be the Post-Gazette article. But even then, we win. And we're saying that we know that the order -- leak is a -- leak implies -- I know we use "leak" in our brief. But leak implies something nefarious. The market could have just learned it.

We know that the order was sent to individuals at Energy Transfer, at 1:00 p.m., on October 29th. It is certainly -- given the Westlaw evidence, the statistical significance of the price drop, the fact that the -- that the work order itself was disseminated outside of Pennsylvania Government circles, on October 29th, we think that at this -- at this juncture, it's very much more plausible that the news of it --

And it's big news, right? It's big. It's big, big news. You know, we did get into the market earlier than October 30th. So that's what I would say. I'm not saying I'm 100 percent right. But I think I'm 51 percent right, easily, with that evidence now. So do you have any further questions about that, Your Honor? Did that help or --

THE COURT: No, no. Just following the thread; that's all.

MR. BROWNE: Yeah, yeah, okay. What else, Your Honor? Let me -- you know, I don't -- let me talk about the December 19th announcement about -- and I'm going to talk about this because Your Honor specifically asked for an

exhibit -- a chart that was in our reply brief on this one. And my colleague, Adam Weirzbowski, is going to do my share-screen for me in a minute here. I do want to put something up briefly. I didn't prepare a long presentation, but I do have something short. But the December 19th investigation, by the Chester County District Attorney, I think Tom Hogan -- yeah. Actually, Adam, you can just put it down for one second. Sorry. Thanks so much.

So the announcement on that day -- and it was a -- Defendants' expert points to a Twitter post, at 11:36. She said she didn't look at Twitter, but then this is what she points to. At 11:36 a.m., that day, that the District Attorney for Chester County was investigating ETE, following reports of numerous sinkholes and environmental issues.

Now, the stock price, or the common unit price, for Energy Transfer had risen in the day, until 11:36. And you can put up the exhibit now, Adam. I'm sorry. I should have let you leave it up. So and this -- it went up. And then when the -- when the -- in the time -- in the next 24 hours, after the 11:36 alleged disclosure of the announcement, the stock dropped -- or I'm sorry -- the Energy Transfer common unit price stock dropped a quite -- quite significantly over the -- over that next period.

And this announcement -- and this is what I want to show Your Honor. This announcement -- Adam if you could --

there are multiple news articles throughout the day that reported on this. So you see, at 1:09, "StateImpact." This wasn't in the brief, Your Honor, because we looked at it at first. But it's -- at 1:00 p.m. -- 1:09 p.m., StateImpact reported on the investigation, and said that Sunoco was surprised to hear -- you know, they basically denied that they did anything wrong. And then there's another one. At 2:47 p.m., the Philadelphia Business Journal picks up on the news, and reports on the Chester County D.A.; and then, at 2:48, almost at the same time, the Philadelphia Magazine reports that.

So the downward trend of the -- of the stock price, in response to that disclosure, we believe is, you know, explained, not only by the announcement of the -- you know, of the investigation itself, but the way that the news picked up on it throughout the rest of the day. And, in fact, inside Energy Transfer, they were acknowledging -- the executives were -- that this -- that this story was gaining traction and becoming an issue. In Exhibit 22 of our reply, there's at least -- Energy Transfer executives received a summary on the 21st that listed at least eight separate news articles, that came out on December 20th, about this -- about this investigation. And, in fact, that Exhibit 20, that internal Energy Transfer document, notes expressly that, on the 21st, it says, "Social media activity was slightly lightly today,

the 21st, than it was yesterday, the 20th, but remained focused on circulating news of D.A. Hogan's investigation."

So when we get to the statistical significant price decline on the 21st -- this is, again, another one of those instances where it did take more than one day to decline. It only took two. But we think there are reasons for it that are reflected in the record that established price impact.

THE COURT: What do you make of the rise in the stock as -- toward of the end of the day, on the 20th, and then the beginning of the day, the 21st?

MR. BROWNE: Yeah. You know, Your Honor, I don't -- I don't know. You know, I don't know whether that lake has fish or not. But I don't -- what I do know is that, at 3:35 p.m., Reuters published another story about it. There was some rise in the beginning. But over the course of the day, on the 21st, there was a statistically significant decline. And, again, the Defendants don't point to any other reason why that would have been. But I think Your Honor's point that some of these things I would submit later in the case, at the loss causation stage, probably will need some more in-depth examination.

But the weight of the evidence and the statistical significance decline the next day does -- you know, when coupled with the fact that there were multiple news articles coming out, and they were acknowledging that internally that

Energy Transfer does give a higher degree of plausibility, I would submit, to the notion that it was somehow related to this instead of the shoulder shrug or in the hands up or whatever that the Defendants point to.

THE COURT: All right.

MR. BROWNE: I'm sorry, Your Honor.

THE COURT: No. Go ahead.

MR. BROWNE: Yeah, okay. Let me see, Your Honor. I don't -- you know, I feel like I don't -- you know, let me -- let me do one more. The arrest of the Constables, on August 8th, which was a Thursday -- you know, the Defendants, again, they kind of rely on the idea that we don't show statistical significance until the following Monday, and that's just enough -- not enough for us to win. Just, as a matter of law, I would say, constraining the event window to that narrow time is inappropriate, and particularly so here.

And, again, going back to the start of our conversation today, there are reasons that we have pointed to, to explain the lengthier decline in connection with this drop. And that's because the Defendants themselves caused some confusion about whether these Constables were related to the company or not. And in particular, when news of the arrests came out, we show, in Exhibit 21, the Defendants issued statements that stressed that the Constables were not Sunoco or Energy Transfer employees. Technically true, but it was causing some

confuse -- they were -- they were employed by them as subcontractors that -- in the Code of Conduct, that we allege in the case, Energy Transfer acknowledges applied to their subcontractors.

And on August 8th, in Exhibit 21, we show that the Defendants, Your Honor, in response to a press inquiry about -- about the Constables' arrests, an ET spokesperson said, "We have a code of conduct for our contractors and third-party vendors. And we expect our contractors and employees to adhere to that." So we would submit, Your Honor, that, again, the Defendants were -- were making further false statements that dampened the immediate negative decline of the Energy Transfer common units in response to that news. Because as it turned out, or in as we allege and as we believe we will prove ultimately, these contractors weren't abiding by the code of conduct, which, by the way, prohibit a lot more than just the Defendants say, "Well, they weren't -- none of those Constables are in jail now." The code of conduct was broader, as we all know, than criminal behavior. And then again, Your Honor, there were news items that we point to that circulated on August 10th, which was a Saturday, about this.

And these news articles, Exhibit 22 in our brief, start to make this further connection between the Constables and directly to Energy Transfer as the market began to understand that, and then the final statistical significant drop on

August 12th. So the last disclosure that I'm going to address affirmatively, Your Honor -- obviously, address with responsive questions -- but is the FBI disclosure. And here, again, this is on November 12, 2019. A pretty astonishing revelation, the FBI is conducting a criminal investigation in the company. There's no dispute on that day -- on the next -- on the very next day. The article came out at 3:29, on November 20 -- November 12th. The stock immediately climbed by 2.6 percent. The next day, it declined by 4.3 percent, which is statistically significant to the 99th percentile.

And I'm always uncomfortable. Defendants' argument is that the Court has dismissed this from the case. And it can't -- it therefore can't -- can't be a part of the price impact analysis. And I'm always sort of uncomfortable arguing to Judges what they have done in their prior orders. But I do think, Your Honor, that, you know, we point -- we point to the section and the opinion in the loss causation analysis where we believe that it's much -- that the Court did not intend to say that the FBI investigation, which caused a statistically significant impact -- negative price impact, is out of the case for purposes of evaluating whether it revealed, you know, alleged hidden and misrepresented truths regarding environmental regulatory issues and the timelines in the construction process.

So we think that's pretty clear, from our brief. But,

again, Your Honor can be the Judge of that, I think, better than me.

So with that, Your Honor, you know, the only other thing I will say, and consistent with what we believe is a -- is a more accurate reading of Your Honor's order, Government investigations and Government criminal investigations are particularly strong evidence often of loss causation, even at the loss causation stage. They are powerful disclosures. And to discount them and say it couldn't have revealed -- market couldn't possibly have learned anything new. But FBI -- upon learning the fact that the FBI was conducting a criminal investigation of the company, in my mind, it does -- it's not common sense. There is a big difference, you know, in common sense and in logic; between kind of knowing that a company had some permitting issues -- which they're largely denying -- knowing that there's some environmental issues on a -- you know, on a complicated project -- which the company says it's getting straightened out -- and the FBI opening a criminal investigation, the market cared about this -- it revealed that there were much bigger and deeper -- no pun intended -- deeper problems on this pipeline than people fully appreciated prior to that disclosure. And it certainly is powerful evidence of price impact.

So with that, Your Honor, I will pause. And I'm happy to answer any questions. And I would, you know, like some

opportunity, if possible, to respond after Defendants have a chance to go.

THE COURT: All right. No. I think I've interspersed some of my questions as we've proceeded. How about we take a five-minute break before we hear from our friends in Texas. All right?

MR. BROWNE: Okay. That sounds great. Thank you, Your Honor.

(Recess)

THE COURT: All right. Plaintiffs, are you lurking there? I can only see the PowerPoint.

MR. BROWNE: Okay, yes. John Browne is here. And, you know, I -- you know, Jeff Golan, from Barrack Rodos, is also here; and Adam Weirzbowski, my colleague -- I neglected to introduce them in the beginning.

THE COURT: Oh, I can see them on the Zoom --

MR. GOLAN: Good morning.

THE COURT: -- in the participate list. I was certainly aware of their presence.

MR. GOLAN: Thank you. Good morning, Your Honor.

THE COURT: Good morning. All right. We'll go back to Texas, and hear from Energy Transfer.

MR. RITCHIE: Thank you, Your Honor. Robert Ritchie for the Defendants. And may it please the Court. In Halliburton II, the Supreme Court stated that Defendants, in

Rule 10b-5 actions may rebut the presumption of class-wide reliance, which is essential to class certification, by offering an event study showing that the misstatements cause no price impact. Defendants have done exactly that here. We've offered an event study as well as additional corroborating evidence that shows that, on the days on which a correction of the statements at issue first reached the market, there was no statistically significant impact of Energy Transfer's price. That's sufficient to carry Defendants' burden of persuasion here based on three principles, which I'd like to go over at the beginning of the presentation this morning.

So the first principle is that, in an efficient market, price impact on the company stock, if one occurs at all, will occur rapidly, within a few hours of the release of information or a single trading date at the most. The second principle is that, in an efficient market, price impacts can only be caused by new news; not by the eradiation of old news that's already been impounded into a stock's price. And the third principle is that an absence of return that can be statistically distinguished from zero is evidence of the lack of price impact.

And there's one other point that I didn't have on the PowerPoint, but I wanted to respond to what Mr. Browne said about common sense here. And he suggests that, just taking a

commonsense perspective of what this case is about, the Court could infer price impact. But I think that really fails to take into account the real context of this case and what this case is about. And it's important to remember -- as we pointed out at the Motion to Dismiss stage and with, I think, discussion your opinion -- that the prior claims at issue here accounted for about 2.5 percent of Energy Transfer's overall land -- land print of pipelines.

And when these disclosures came out, on four of the six days, analysts said nothing at all about the disclosures. On one of the other days, analysts explicitly suggested that the disclosure would not impact their valuation of this stock. And so, on only one date -- and it's the November 12th date -- was there substantial analyst coverage about that event. And we'll discuss that in detail why we don't think that shows price impact either.

And so we think that actually contrasts this case with other cases. Mr. Browne said he felt this was different than a lot of cases he's worked on. We felt the same thing. Because in most securities fraud cases we've worked on, the corrective disclosures show a huge downward movement in the stock that's clearly related to the alleged fraud at issue here. And we've talked about a disclosure that you had an earnings miss and a 30 percent drop.

Here, we're talking about very small statistically

insignificant drops. And, in fact, I think that's why you see in a lot of the cases -- which we'll go over in a minute -- that Defendants are often trying to focus only on front-end price impact, even in price maintenance cases, as Plaintiffs allege here, because, there, they can try to get away with showing a lack of statistically significant impact. We don't do that here. We'll argue the front-end as necessary -- and I think has a small role in this case. They've only argued one date that has front-end impact, despite a fact that it's extremely similar disclosures to all of their other front-end statements.

But we welcome the idea that we need to look at the back-end. As many cases have held, when a Plaintiff alleges a price maintenance case, the best place to look for price impact is at the back-end. And, here, Plaintiffs can't do that either. And so I actually think this case is very unique and distinct from a lot of the price impact cases you see and why Defendants have a strong argument that there's no price impact here.

THE COURT: As to your first principle -- which obviously is wildly accepted by economists -- does it depend on the type of disclosure; in other words, the speed with which the market absorbs it and reacts? And, by that, I mean, is there a difference between quantitative news and qualitative news? Quantitative, for the sake of discussion,

we'll call "earnings." And qualitative, "developmental news," that will talk about a project. Is there just logically more of a reason that there would be a delay when the disclosure in question is not strictly quantitative?

MR. RITCHIE: So, Jimmy, you go ahead and turn the slide. So I'm going to go into each of these three principles in a lot greater detail. And the answer to your question, I think, is that, yes, in some instances, there could be a distinction between the type of disclosure and how long it takes to be impounded into a stock's price.

So Plaintiffs' expert points out -- you know, there are some unique situations, such as, for example, if the disclosure is made on day one, in Hungarian only, and it's not translated into English until day two, well, maybe you'd look at day two. And that's -- I think we could have an interactive debate on that perhaps. Luckily, we don't have to go into that, because we don't think that there are any such disclosures here. And I think simply drawing a qualitative-quantitative distinction is too simple. And the reason is that, in order to invoke Basic in the first place -- and it's both -- both a theoretical matter and a factual matter as far as what Plaintiffs have alleged on Energy Transfer's stock.

And so in order to invoke Basic, in the first place, Plaintiffs pointed out that Energy Transfer was closely

followed by analysts, market makers, traders, arbitrageurs, during the class period. And that as a result of that intense trading -- intense coverage and trading competition, Energy Transfer's stock would react so rapidly to new information that it would be impossible to our nexus returns by trading on that information. And that argument is essential to Plaintiffs' request for class certification. Because if a market does not react to new news within minutes, one cannot presume that each statement at issue would be reflected in every trade made by class.

First, there's trades going on at all times. And so if it's possible for investors to beat the market by trading on information before it's reflected in the stock price, individual analyses or reliance would be required, and individual issues would predominate over class ones.

So what we would argue is that, unless it's something where the news is so complicated -- such as the Hungarian example -- that it's not reasonable to think it would be possible for investors to trade on that information before it's reflected in the stock's price, that you must assume that at all times that material information is reflected in the stock's price in order to invoke Basic in the first place.

THE COURT: Well, Ms. Allen concedes it's an efficient market. I mean, it didn't seem to be in dispute.

MR. RITCHIE: Absolutely.

THE COURT: But now I see you sort of almost advancing a legal principle, which is that if at any point a disclosure is not something that was rapidly and automatically absorbed, then that undercuts the existence of the efficient marketplace, and I'm not sure that the two are necessarily mutually exclusive. So --

MR. RITCHIE: You know, during (indiscern.), I think what our argument is is that plaintiffs can't have it both ways. In order to invoke an efficient market and invoke Basic in the first place, they had to argue that Energy Transfer's stock incorporated new news so rapidly that it would be impossible for investors to trade on that information before it was reflected in the stock price, and that's because Basic holds that on well developed markets, a stock reflects all publicly available information at all times. That's I think the essence of the presumption. Because if that's true, everybody who trades on the stock is trading in reliance implicitly, if not explicitly, on the statements. They're in the stock price. There's not a gap of time where people can trade on the stock knowing the news but it not being reflected in the market, or vice versa. If there were that gap of time, basic wouldn't hold. The presumption would fall apart. And we don't disagree with that principle. We don't disagree with how Mr. Kaufmann got there, his arguments about how many market makers there were and how rapidly Energy Transfer would

absorb new information. But what we are pointing out is that, as the 11th circuit holds in the court on the screen, that a plaintiff that invokes the petition markets and presents evidence like this, and it's true in this case, cannot -- you know, must take the bitter with the sweet, as the 11th circuit said. You can't turn around and deny the rapidity with which that information would be reflected in the market for the purpose of avoiding other issues, such as price impact.

THE COURT: All right, I get the proposition you're advancing.

MR. RITCHIE: Okay. And we don't -- there's also no general basis to do so. I mean, I think it's textbook finance as we point out on page 14, #3, that the price of a stock on Wednesday afternoon will already reflect information contained in a Wednesday morning press release. It's not a novel proposition we're advancing. Mr. Kaufmann, as we said, reflects it. He uses one-day windows to evaluate whether an Energy Transfer stock reacted or did not react on no news days to information in his own bid study. And in the prior case, Mr. Kaufmann testified that the "unequivocally appropriate day to evaluate price impact" {close quote} is the new -- is the day the news is released and not the following day, which in that case another expert had suggested. And we point that out at page 15 of our opposition paper.

Plaintiffs point to Endo, a Judge Baylson case out of

this district to target --

THE COURT: He's my colleague, yes.

MR. RITCHIE: Correct, yes. And that case is no exception. In that case a disclosure was made on day one, and a clarification was made on day two. And the court held that it was reasonable to look at day two as well as day one for purposes of class certification in that instance. The defendants don't dispute that. In fact, for example, as Mr. Browne talked about, on August 9th there was a disclosure, on August 10th there were endless reports that gave more details to the disclosure, and in our price impact analysis, consistent with Endo, we look at both dates. And that's really -- that's what all of these cases out of courts in the 3rd circuit are saying on this matter. They're not saying that you can just skip ahead dates to day three when there was no news at all, and you would have had a whole trading day for investors to look at that information.

THE COURT: I think you could assume that to the extent that I'm going to look past a day, it's going to have to be on the basis of some facts that make it reasonable to do that, and you can assume I agree with the proposition that an expert can't just pick a window that proves a point. They need to pick a window that's justified by the evidence in the record.

MR. RITCHIE: Very good. Then that is the gist of

our first point, is that you need a compelling reason, as the Halliburton II remand decision said, to look beyond that day one. And we would just stress that it would have to be a reason that would show that it would be impossible for investors to have traded in that stock during that window, during that first-day window. So that's the first principle I wanted to talk about.

The second principle is simply a corollary of the first. It's that only new news can affect a stock's price, not the reiteration of old news. And the reason for that is because an efficient market will have already impounded old news into its stock price. So and once that's done, it can't be done again. In our opposition brief, we cite numerous authorities on this point, and I don't think I need to belabor them because I don't think plaintiffs are disputing it. And as you see, their own expert said in another case, and they don't seem to be disputing in their briefs, that statements that repeat information already disclosed to investors are not expected to impact the price of the security trading in an efficient market. So there are some -- again, some disputes about the application of that principle and whether news is new that I'll talk about in a moment. But the mere repetition of news should not affect the price of security trading in an efficient market.

The third principle I wanted to talk about this morning

is that a lack of statistically significant price movement on the date that a disclosure reaches the market is strong evidence of a lack of price impact. We believe this is implicit in Halliburton II in which the supreme court explicitly invites defendants to proffer event studies at the class certification stage, and states that by doing so they can show a lack of price impact. And the cases following Halliburton II, most clearly the Halliburton II remand decision itself, took that for granted. Judge Lynn denied class certification as to corrective disclosures for which there was no statistically significant movement on the day in which the news reached the market.

Claimant's cases, again, are not to the contrary in our view. Plaintiffs cite three decisions within the 3rd circuit, they're all district court decisions or non-binding summary orders of the 3rd circuit, and they say that -- they indicate a point, so the lack of statistically significant price movement following a misrepresentation does not necessarily show a lack of price impact. But those cases are not pronouncing on the evidentiary value of an absence of statistical significance in general. They are opining on a timing issue. What they are saying is that where a plaintiff is relying, as plaintiffs here are relying, on the price maintenance theory, one must look at whether there was a price impact at the time this statement was allegedly corrected, not

right after it was made. And most of the other cases plaintiffs cite from outside of the 3rd circuit are making the same point, or they're arguing, as the 3rd circuit cases also argue, that merely relying on a plaintiff's event study without doing the legwork yourself, as we did here, may not be sufficient. So we think all of those cases are distinguishable.

And plaintiffs do, as Mr. Brown pointed out in his presentation, rely heavily on this Northern District of Georgia case that is the Monroe vs. Southern Company case. But there are a couple factors in that case that we do think make it distinguishable. Most notably is it seems to very clearly rely on a burden of proof or a burden of persuasion that is not compatible with the way it was laid out in Goldman by the supreme court which came after that decision. So it says things such as that defendants have not conclusively established or proved to a scientific certainty that there is no price impact. And of course, when any party is tasked with proving a negative, as we are here, those standards are going to be impossible or at least I would think impossible. To me, you have -- you can't presumably do a negative to a scientific certainty, and --

THE COURT: Well, your burden is preponderance of the evidence, right?

MR. RITCHIE: That's right. That's my point.

THE COURT: You've got the burden -- you agree with me that Goldman says A) you've got the burden, not just to production but of persuasion, and B) your burden is proof by a preponderance of the evidence, correct?

MR. RITCHIE: I do agree with that. And Goldman stressed, and I think it used the word emphasized, that that burden should rarely be dispositive, and it should only come into place where the evidence is in (indiscern.), which we don't -- we think it certainly is not here, and Goldman --

THE COURT: Well, wasn't that dicta to assuage Justice Gorsuch? I mean --

MR. RITCHIE: Well --

THE COURT: -- as I -- I understand all the emphasis you're putting on that, but at the end of the day it seems to me we've got a well-defined standard, and it also seems to me that the other thing Goldman says that plaintiff puts more emphasis on and you put less emphasis on is the need for the district court to look at all of the evidence and decide those issues based on all of the evidence would necessarily include the statistical and the non-statistical, and then I think, because we have (indiscern.) experts about what the appropriate window is, and then the models, and then we've got Kaufmann even saying, well, we had a type I versus type II analysis. My model is different. As I view it, I need to take all that into consideration, along with all of the

articles and the timing and the market data, and based on that decide whether you've met your burden. That's how I read Goldman.

MR. RITCHIE: I don't disagree that Goldman certainly holds that the court must take into account all the evidence and that the standard is a preponderance. You know, I take its, you know, emphasis on when that standard should apply seriously, but whether it's part of the reasoning in the decision of dicta is, you know, it's a hard law school test. But --

THE COURT: Well, when we're talking presumptions and burdens, that almost restates the evidentiary standard, right?

MR. RITCHIE: That's right, but I think what I take Justice Breyer to be doing, not only is he responding to Justice Gorsuch, but responding to lower court decisions, such as the Monroe decision implicitly, where it's saying things like you must prove inclusively or to a scientific certainty, and it's saying, lower courts, that's not actually the standard. And the reason this is -- this seems like it's such a big deal where the burden is, is because that has been misapplied repeatedly and it should only come into place where the evidence is in (indiscern.). But I do agree with Your Honor, of course, that the case says you should take into all -- take into account all of the evidence, statistical and non-

statistical, and we think that all supports us, as I'll continue to explain. But as far as the statistical evidence, I did want to talk about the fact that -- plaintiffs' fishing analogy from the Monroe case. Plaintiffs say that a statistician that says he did not find statistical significance and therefore has evidence that there is no price impact, it's like a fisherman who drops a line in a pond and says, having caught no fish, there must be no fish. But the problem with the fisherman's statement there is he did not run any sort of scientific test of the question. If he had, if he had used some radar mechanism or, you know, dozens of fisherman on dozens of days, you know, to really assess the question, and he had determined from that that there's no evidence of price -- of fish being in the pond, that the evidence is consistent with zero fish being in the pond, he would have evidence that there's no fish in the pond, because he'd run a powerful test and he did not come up with any evidence. So the problem with the fisherman is he's not done so. He's, you know, just --

THE COURT: I think for present purposes we can assume the district judges in Georgia do a lot more fishing than the district judges in Florida, and that's not really going to drive my analysis.

MR. RITCHIE: Okay, fair enough. That makes sense to me. Plaintiffs also pointed out at one point, although I

think it was down-played in Mr. Brown's presentation that defendants are relying heavily on a 95% level of statistical significance, and they point out that there are some cases, such as the Chicago vs. Nairn case, that say yes, to be sure, that is the standard that most statisticians use, most academics use, and that the courts have generally required. However, if you get very close to that, say above 90% statistical significance, you can also look at that perhaps as positive evidence of a price impact. But the important thing for us is that's academic in this case because defendants aren't relying upon any date in which there is price -- or there is statistical significance above 90 but less than 95 to argue, that's our evidence of a lack of price impact.

And lastly I would point out that defendants, to your point about the Goldman case and what it required, have buttressed their evidence with non-statistical evidence, so the surrounding analyst commentary. As I said, for four of the six corrective disclosures, there is no analyst commentary commenting on these corrective disclosures at all. On one other one, the analyst commentary is suggesting that there would not be an impact on the analyst evaluation from what is claimed to be a corrective disclosure. And then on many other dates, an additional piece of non-statistical evidence, is that there are many other dates where very similar disclosures were made, as our expert points out in her report. And

plaintiffs, curiously, have not chosen any of those dates as corrective disclosure dates. And the reason appears to be selection bias. They've looked at those dates; there was no upward price movement and so they said, well, that won't work as a corrective disclosure statement, let's see if later on there's a similar date and we'll use that. And so that runs into the problem of both no new news, but it also undercuts this argument Mr. Browne was making which said, well, on, you know, all of these dates there was very slightly negative non-statistically significant but negative movement. Well, that's not really instructive when you cherry-pick the dates on which you are making that analysis.

So those are the three general principles, and I think those really decide this entire case and that it's just an application of those three principles. And so but now I want to -- do want to apply them to at least several of the key dates at issue, and especially the ones that plaintiffs raised in their surreply, and we haven't had a chance to respond to, once again.

So first of all is the first corrective disclosure date, the August 9th through the 13th window. In that window, plaintiffs argue that on August 9th, Energy Transfer reiterated previously disclosed news that it would be using a 12-inch pipeline to complete certain sections of Mariner East. But as the complaint itself concedes, that information had

been previously disclosed on July 3rd, 2018, had no significant price movement. In fact, upward movement, but not statistically significant, so indistinguishable, or zero. And as a result, it's a straight application to the second principle I discussed, that on that day that news had already been impounded into the stock's price. And I don't think plaintiffs are really disputing that anymore. They seem to largely be focusing on August 10th, the next morning, when before the market opened, two analyst reports were released that gave additional details on the impact of the use of that pipe and gave how that would impact the capacity and spelled that out and distributed that information to investors before the market opened. Now there is reason to question, as a qualitative matter, how news-worthy that was for investors to the price of the stock, because those analysts reach a conclusion that this would not have an effect on their overall evaluation of the stock. They certainly note it in their report, they discuss it, but they don't say we're changing our price targets because of this, and in fact they say the opposite. And another reason is because after the July disclosure that the smaller pipeline would be used, there were analyst reports at that time, or at least one analyst report that we cite, it's exhibit-30 to our opposition, that acknowledged that this smaller pipeline would be used and it would have an effect on capacity. Didn't have the precise

numbers to be sure, but there -- it was, you know, a common sense acknowledgment that there would be an effect on capacity and no impact on the stock (indiscern.).

But in any event, in addition to these qualitative factors is the quantitative issue that is undisputed. Both experts on each side found no statistically significant price movement on August 10th. So plaintiffs are left to argue that the court should look to the movement of Energy Transfer's stock price on August 13th, but as discussed, the entire purpose of plaintiff's indication, the basic presumption is that Energy Transfer's stock price would react so rapidly to new news that it would be impossible to trade in the stock after news was released but before it was reflected in the stock price, and that's entirely inconsistent with the idea that news could be released before the market opened on August 10th, to a whole trading day after investors were given this information to read and there was this competition among arbitragers, investors, and market makers. It had no effect on the market that day, and it skipped until the next Monday before we see an effect.

So in response, plaintiffs argue that defendants should be required to offer an explanation for Energy Transfer's stock price and the movement on August 13th and that we just get -- it's the shrug argument that Mr. Browne made. But plaintiffs themselves recognize, and it's explicit in Mr.

Kaufmann's report, that on one of twenty {quote} "no news days, Energy Transfer stock price would be expected to move statistically significant based on inherent randomness alone." That's Mr. Kaufmann's opening report at paragraph 62. And so it's not surprising, particularly given that plaintiffs skipped over many other dates that could be corrective disclosures that didn't happen to be within a couple days of a statistically significant decline, that they were able to locate a couple. For example, they skip over the July 3rd disclosure for exactly that reason. So it's not surprising, just given the fact of how often this would occur, that they could find a random date. So we argue based on all of those factors that there should be no price impact associated with August 9th through 13th, with that corrective disclosure window.

And the second window that I want to discuss is the November 12th through 13th window that's mentioned in the surreply. This is a window that's based on news that the FBI was investigating not Energy Transfers, I think Mr. Browne stated, but probably impacted (indiscern.), there's just no statement in the article that Energy Transfer is being investigated, but that Governor Wolf's administration was being investigated as to -- into conduct approving construction permits for Mariner East 2.

So plaintiffs argue that Energy Transfer's stock price

movement in response to this news shows price impact. But the question we've asked is as to what statements? Price impact must be shown as to particular statements at issue. You can't just pick any stock price movement at any date. And as our opposition has explained, the statements with the most direct connection to this news have been dismissed from the case. And the other alleged misstatements, to the extent they needed any correction, had already been fully corrected long before November 12th, 2019. So for example, plaintiffs argue that one of the statements that was corrected were timeline completion statements regarding Mariner East. But the most recent statement on that point was made in I believe August 2018, predicting the completion in 2018 at the reduced capacity, as at the -- around the time of the August statements. And then in December 2018, the news became public that Energy Transfer had in fact put Mariner East into service at its reduced capacity in December 2018. So it strains credulity to think that 11 months later, that statement from August was still being corrected by the mere news that the FBI was investigating the permitting process into Mariner East 2. And this is especially so since there was explicit news about what the FBI was investigating before November 12th. There was news about the allegations of the DEP overlooking deficiencies. There was news about Governor Wolf's administration supposedly threatening people with their jobs.

All of this had been previously disclosed. So the new piece of news was a very small sliver that said the FBI has taken a bit of interest in this news. And plaintiffs argue that this corrected essentially every segment of this case. And we've asked them, explain how. How does that work, for based on the reasons we've pointed out here? In light of all this other news, all the prior corrective disclosures, all the potential corrective disclosures they've ignored that we outlined in our expert report, how does that work? And their argument is essentially, look, that's a loss causation issue. We don't have to look into that. And that, it was explicitly rejected in Goldman. Goldman says on several occasions that the fact that part of the analysis of price impact overlaps with a merits issue, such as loss causation, is no basis to ignore that issue. So we just think that argument just does not work. Now they have a number of cite -- pre-Goldman citations, and I think they found a district court, we would contend erroneously, post-Goldman that said that. But it's just slightly incompatible with statements like this in Goldman.

THE COURT: Well, Goldman says the evidence should be considered, it doesn't say loss causation needs to be decided at the certification stage.

MR. RITCHIE: Loss causation doesn't need to be decided, correct. And I think we're saying --

THE COURT: Right, yes, so that falls into the basket of I need to look at all material evidence.

MR. RITCHIE: That's right. That's right. We're saying it's plaintiff's argument that you can't look at that because it overlaps with loss causation, that fails. That's all we're saying here.

So next I want to point to plaintiff's front-end price impact argument. And Jimmy, if you'd bring up the chart on that, on the front-end base, you know, as an initial matter, we find it a little convenient that plaintiffs have plucked this one date where they're going to argue this is not a price maintenance date. Because it's very similar. The date is a reiteration of previously stated timelines, right. There are other statements that are like that. They don't claim those are inflation-introducing statements. And the reason they don't do so is because if they did, up front and pricing back analysis would undermine their argument. They have no statistically significant entries on any of those dates. The only other date they have is day 26, we argue about in our opposition, and they dropped, and they said that's actually a price maintenance statement, too. And so it seems what they're doing is while they found a positive price movement, that was on the same date as an earnings call with positive news, and they said, well, you know, we'll argue that this is front-end price impact. But the problem for plaintiffs in

doing this is that it -- their claims -- their own expert has conceded, both here and elsewhere, that an analysis of front-end price impact only makes sense if the statements would be expected to surprise the market. And that's because if a statement reflects what the market is expecting to hear, it would already be impounded into the stock's price -- this is the second principal I talked about -- and not cause a price impact. And here, the August 9th, 2017 statement merely reiterated already public timelines that had been publicly stated just a month before -- just over a month before, on June 27th, 2017. And to be sure, some analysts noted those timelines in their analyst reports. We don't deny that; we never have. What no analysts say is, oh, this is surprising and this is great positive news, because we thought that in the interim from June 27th to August 9th, that five- or six-week period, we expected the timelines to get much worse, and in fact they didn't. Nobody says that, they just note them, which is, you know, a common thing that analysts do, they note, you know, all sorts of facts whether or not they're surprising or not. And in fact -- Jimmy, if you can turn to slide 10 for me -- plaintiffs' own expert -- Mr. Browne disputed this, he called this a Hail Mary argument, but I respectfully disagree. Plaintiff's own expert stated that there is no evidence of which he is aware that would suggest that any of the alleged misstatements would contradict

existing market beliefs or surprise the market. And he also stated that he has not asserted that any front-end impact occurred. So he then goes on to have some criticisms of our expert and her analysis of this date, but he's very careful, if you read those paragraphs, he's very careful not to say he's opining that there was a front-end impact. And in fact, in paragraph 57 he says exactly the opposite, said there's no evidence of which he's aware that would suggest these statements would contradict existing market beliefs or surprise the market, which means, based on statements he has elsewhere made, and makes, in fact, in the prior paragraph in his report, that you cannot reliably evaluate front-end price impact on those statements. They are in fact price maintenance statements and you should evaluate them solely on the back end. So we understand there's no evidence of front-end price impact for this date or for any other date, and you can -- the court can focus its analysis solely on the back end, as many courts have done.

As to the back end on the other dates, if we can pull up the other chart here, the other dates -- there's no other date that has a statistically significant decrease. And as I said at the front of the presentation, this is really remarkable in the context -- and these, of course, are the dates when the news reached the market, not their dates several days on in which they found those. But that's really remarkable and I

think distinguishes this case from most security fraud cases. Most security fraud cases come when a -- you know, plaintiffs go to the market after seeing a huge decline that's clearly related to something, and we just don't have that here. What we have is something that is closely tracking the market, it's not statistically significant, and both experts are agreeing to this. There's no expert dispute for this court to adjudicate. There's nothing we have to adjudicate about which index to use or whether the bond (indiscern.) adjustment needs to be used or anything like that.

And so just to address a couple of these dates that Mr. Browne did, the October 29th, 2018 order, you know, I think the court's questions to Mr. Browne reflect largely our arguments, but on that date, on October 29th, 2018, plaintiffs point out that the DEP issued an order to an MD transfer, a stock work order, but it was not publicized until October 30th, 2018. We received -- you know, we got a certified copy of the email in which the press release announcing this is released. Then we asked the DEP, "DEP, just to be sure, did you release this press release to anybody before October 30th, 2019?" Including state's news service, the article that Mr. Browne found. And they said no, we did not. We have no records of that. Okay, so then let's look at this article Mr. Browne found on Westlaw. It said -- it does have a timestamp of October 29th, and they said, well, that's evidence it was

issued on October 29th. But they can't find, and we can't find, any publication of this anywhere except Westlaw, and it wouldn't make sense that they would have that press release before October 30th, based on what the DEP told us. So --

THE COURT: Can I interrupt you with a nuance question? And my nuance question is when you said we asked DEP and DEP said, you really did that by way of the document request, right?

MR. RITCHIE: Yes.

THE COURT: And the information request. And so you're interpreting their lack of records as answering your question the way that you're putting it forward. But what am I to make of the timestamp of the 29th on Westlaw?

MR. RITCHIE: Yes, absolutely. So we do have one article, it's published only on Westlaw. The only evidence in the record is that the only place it was published is on Westlaw. But when did Westlaw publish that article? Westlaw published it on October 30th. You can confirm that through Westlaw's metadata and searches, as we point out. So that article, why it has a timestamp of October 29th, I don't know, based on what the DEP told us, okay. But we know it wasn't published on Westlaw until October 30th. So all of the evidence in this case points to the first publication of that news coming out on October 30th, on which there is no statistically significant decline.

THE COURT: I guess where I'm hung up here, and this is where I think burden might potentially matter, I'm not sure, is the mere fact that somehow it would come into the possession of Westlaw on the 29th, regardless of when they put it on its website, suggests that DEP sent it somewhere other than simply to Energy Transfer, and it's just that the document request -- and I'll be candid. When I look at a document request via a state agency like that, I don't think its absence of documents as being strong evidence of what really happened just because of the nature of the beast. And I don't say that critically to them, it's just that I don't know how well they would track something like that, or candidly, how seriously they would take that request, how deeply they're digging, you know, just hey, is there anything in the file? So I'm just -- on both sides of the argument here, I'm a little confounded.

MR. RITCHIE: Well, I'm not really disputing the points you're making here. I would just say that we have put forward this evidence, and it's the best way we know how to come up with when this was released, asking the DEP, can you give us a certified copy of when this press release was distributed? They did so, it's October 30th. And asking them, okay, well, just to be sure, because I guess it's possible it could have been before, do you have any records of it going out before? They say no. So we think that is

evidence -- maybe not irrefutable evidence, but evidence that this was issued first on October 30th. Plaintiffs, on the other hand, don't have any evidence that it was issued on October 29th. The closest they come is this Westlaw article. But we have untangled that and shown it to be consistent with what the DEP said, that it was actually first published on October 30th. And so because this news wasn't public, investors didn't have the opportunity to trade on it until October 30th and it couldn't first hit the market. Now you can always speculate, I suppose, that any news, and that would in fact evaporate the whole price impact analysis totally if there was just enough to speculate that there could be another -- you know, this could have come out on this date with no real evidence, just speculation. But, you know, it's I think well-settled law and we cite a 3rd circuit case with this principle, that speculation is not evidence. So I think in weighing the proposed --

THE COURT: That was another one of those non-precedential cases. But we'll assume I agree, just as a matter of general common law, this regulation is not evidence.

MR. RITCHIE: That is correct. Actually I do remember that.

THE COURT: I do read the briefs.

MR. RITCHIE: Good, yeah, I'm impressed. That is a very nuanced memory. So that's great. But if you take that

general principle, whether or not that's binding or not, they have only speculation, non-evidence. We have evidence, maybe not irrefutable evidence, so we think the preponderance to the evidence clearly shows that the appropriate date to look at is October 30th, when there is no price impact.

Mr. Browne also looked at December 19th, 2018. This involved an announcement by the DA of Chester County of an investigation into Energy Transfer. On that day, as we pointed out, Energy Transfer out-performed the market. The plaintiffs said, well, but you didn't take out those first 2½ hours. And, you know, we've put in some evidence that says, look, that's just not standardly how event studies are done; you look at the full day, and that's why we did that. But let's take them at their word. What happens if you do take out the first two hours and just do 11:36 a.m. to close that day. Well, Mr. Browne's interest in Sharp that shows a downward trend does not control for the broader market. And if you do, using the SMP oil and gas and consumable fuels index, which is -- we didn't just make up, that's the index that Mr. Kaufmann uses to control for market movements, Energy Transfer out-performed the market. Not only was there not a statistically significant decrease, it out-performed the market on that date. So there's no evidence of a price impact on that date. And if you look at the next date, December 20th, you find the same thing, Energy Transfer out-performs

the market once again. And they argue, well, you know, news organizations continue to report on this. But associated press -- first of all, we think the initial news, distributing the press release from a news reporter is sufficient. But even if you didn't, if you thought it needed to be a broader outlet, numerous outlets reported on it, including the Associated Press on December 19th. So you would have to look, either December 19th or perhaps December 20th, which we would disagree with. But if you look at it, Energy Transfer again out-performed. So there's just no evidence of price impact on that day.

And the final date that I think Mr. Browne talked about was the August 8th, 2019 date when the Chester County DA arrested two Pennsylvania constables. The result there is similar. The news broke at 1:12 p.m. After that, Energy Transfer traded up throughout the rest of the day, and there wasn't a statistically significant price impact the next day either. Instead, plaintiffs are left to kind of their standard bowback argument of, well, what about the next day after that, which we think is flatly incompatible with Basic, and in fact the factual arguments on which they relied to invoke Basic, which we agree, which is to say that Energy Transfer's stock price would react to movement so rapidly that it would be impossible for traders to beat the market by trading on that information before it was reflected in the

market price.

So with that, I think I've covered all the dates I wanted to cover, and I'll pause in case the court has any questions.

THE COURT: And I think I've interspersed some questions as we've gone along, the briefing is voluminous. But I'm going to give both of you a chance to go around again. So we'll hear from Mr. Browne, but that will not be to the exclusion of your responding. We'll take another five-minute break, okay?

MR. RITCHIE: Thank you, Your Honor.

THE COURT: And then we'll reconvene.

(Recess)

MR. BROWNE: Yes, Your Honor, I am.

THE COURT: All right.

MR. BROWNE: Go ahead? Okay, thank you. Your Honor, I'm going to just try to keep this focused on some of the -- directly responding to some of the points that my friend on the other side made, and I'll try to keep this short. So there was a discussion during defense counsel's presentation about the idea of looking past a one-day event window, and when or when that may not be appropriate. You know, I do believe there is case law in the 3rd circuit and elsewhere, and I take Your Honor's comment about that, which I'm going to address, but I do think there's case law in the 3rd circuit and elsewhere that far -- that makes pretty clear

that you don't need a compelling, life-threatening, super-focused, unrefutable reason to look to a two-day window. It's not -- this idea that it's so -- you have to point to so much evidence to ever look to a two-day window really isn't supported by any of the law. They have the Halliburton II case, I understand that. The Halliburton II case was decided several years ago. It certainly hasn't resulted in an adoption, an overwhelming adoption in the courts of both. You have to have a one-day window only, and 2) it has to be statistically significant on that day or plaintiffs lose. It's just not the way the law is cut. So all that being said, and we discussed this before, as I pointed out in my presentation, we do have compelling reasons, you know, for each of the disclosures that took more than one day to result in statistical significance. Too we have one day, but we've gone through those and those are in the briefings, so I submit that when -- if Your Honor is looking for a credible and a plausible basis in this case to look past one day, in many instances you will find it in defendant's own statements, confusing the market and obfuscating the issue, which they should not be entitled to benefit from now by combining this at this stage to a one-day window. So that's one. 2) Your Honor, an August 9th, 2018 dispute between the parties, the defendants claim that we're assuming -- and this was the Frankenpipe announcement, you know. And our primary argument

certainly is that, you know, is that the market was confused by the statements on August 9th, and that wasn't clarified until the 10th, and we think the evidence on that is pretty strong from the analysts and elsewhere. But I want to point out that on August 9th or for that day, or expert does so that there was an implied stock price -- I'm sorry, common unit price increase of about 94 or 87 cents, and that could be due to positive news that was introduced on August 9th. So we're not conceding that August 9th didn't necessarily -- didn't have a price impact. And defendants have done nothing, again, to disaggregate the impact of the positive news, which our expert quantifies from the potential --

THE COURT: Well, how do you respond to the July 3rd argument, the idea that in -- I guess it's paragraph 171 of your complaint, you affirmatively plead that there had been a disclosure there about the use of the 12-inch pipeline. They say, well, that's therefore known and factored into the price, and what would your response to that be?

MR. BROWNE: Well, Your Honor, I had a couple of responses to it. First and most facially, July 3rd isn't August 9th. So as of August 9th, it is new news that the project is still on track. It could have gone off track between August 3rd and August 9th. As we know, it eventually did go off track. So it is new news, you know. It is saying now, today. I understand it's a month in a little bit, but it

is a month later and we're still on track. So 1) that is new news. And secondly I would say, Your Honor, the -- if you look -- if you look at the Allergan case from New York in 2021 Westlaw 4077942, we cite it in footnote 12 of our reply brief, it rejects -- it calls it nonsense and, you know, you can reject it without calling it nonsense. But this case rejects as nonsense the idea that because there wasn't a statistically significant price increase in response to prior similar news, that that undercuts -- I should have said price decrease -- that that undercuts the fact that there's a -- that means that a later statistically significant price decrease in response to news that could be characterized as similar to early news, that doesn't rule that later response out as a matter of law. So I would direct you to that case. I do think it's new news in many ways, and I think, again, if it had already been reflected in the stock price before, defendants don't explain why the stock price then dropped a month later. And we respectfully submit it's because it was new news and it wasn't already in the market as of that date.

So I want to move on, Your Honor, to this idea that the defendants have of it's very difficult for them to prove a negative. And, you know, I'm not shedding any tears over the burden of proof that the defendants bear here, but I would say that one easy way or much more compelling way to prove a negative, i.e. in this case that the stock -- the unit price

has declined in the response, it's just not what plaintiffs say, is again to point to something. Like I mean how much more compelling would it be to say it's not what plaintiff's said, it's this. And in almost no instances do defendants take that step, which would be, you know, much more powerful to say, you know, plaintiffs have an explanation, but it wasn't that, it was this. They just say plaintiffs have an explanation we don't think is right, but who knows what caused it. So I do think there would have been ways here, and in some cases that if there was a good argument about lack of price impact, that there would be things like that to point to, and the absence of them here is notable.

There was a discussion about the Goldman burden. I think everyone understands burdens of proof, so I'm not going to address that. On -- you know, on the Monroe case and the fisherman/scientist test, I just think that the Monroe case, when you read it -- and I understand it's a district court, not even this district, but it didn't turn on the burden thing. It had a very sophisticated discussion of the economics surrounding these issues, and I don't believe -- they attempt a distinction, which, you know, I understand why you attempt to distinguish it, but I don't think the attempted distinction there by saying, well, it was -- it cited a different burden and therefore it doesn't count, undercuts any of that solid legal and scientific reasoning in that case.

Your Honor, you know, I kind of addressed this in the beginning, so I'll make it short. You know, their expert doesn't concede that there's a lack of front-end price impact in the case, and if you look at the expert report, paragraph 57 and read like the next few paragraphs, it's very clear that he says that Dr. Allen's own analysis that shows a statistically significant price increase. This is the front-end point, you know, supports plaintiff's allegation. So while defendants match up a sentence in Mr. Kaufmann's report that out of context looks a little bit odd, there's no overall argument that our expert conceded that there's no front-end price impact. He's just saying that the statistically significant price increase as identified by defendant's experts supports that notion, and we certainly are contending that there was a front-end price impact.

On the October 29th disclosure, this is the fact dispute about whether it was really October 29th or October 30th, defendants don't know anything about when this came out. They did some Westlaw searches and they asked a narrowly -- I'm not saying it was intentionally narrowly, but they drafted a narrow written question to a state agency that was answered by its own terms, an October 30th press release was not distributed before October 30th. It's completely wrong to say that the plaintiffs are only relying on speculation to -- for their point that the news came out to the market on October

29th. We're relying on a Westlaw article that's dated October 29th, and by the way, that Westlaw article says that pursuant to a stop work order that was issued today, okay, and it's indisputable that the stop work order was issued on the 29th, it was issued and mailed to Energy Transfer, it was in possession of individuals outside of that state agency, so when you look at the article that the defendants claim was published only on October 30th, it also says due to a stop work order that was issued today. Now that raises some questions in my mind, because we know that's not right, right. We know it was issued on the 29th. So there's some internal consistency even between the article that they point to and -- maybe no one knows anything about this yet, like maybe there needs to be some more discovery about how this happened, but we're not just speculating that it came out on the 29th. We have evidence. And when you couple that with the statistic -- you know, the statistically significant one day, defendants love that, one day statistically significant price decrease, which is again explained by nothing else, that's certainly evidence of price impact at this stage of the case.

So Your Honor, I think that's all. I think everything else has kind of been covered in briefs, but if you have any questions -- let me see if my colleagues sent me any emails. Yeah, I mean, I guess -- I suppose the only thing that I would add, you know, Your Honor, with respect to the July 3rd issue

that you asked about, is that, you know, the July 3rd issues were disclosure the defendants point to was much more vague and specific than the August 9th ones that we do later. But other than that, Your Honor, if you don't -- if you have any questions, I'm happy to (indiscern.).

THE COURT: I have a question for both sides. The same question for both sides. But let me hear back from Energy Transfer if they have any -- what would this be, surrebuttal? Whatever it is, we'll go back to Texas.

MR. RITCHIE: Okay, just very briefly. I think we -- I do want to cover a couple of the points Mr. Browne just made. So, you know, on the (indiscern.) window point, he says that we don't have evidence or law in our favor. I think that that's wrong. Obviously pointed to Halliburton II's remand decision. There has been cases that have followed that decision. So I do think there's law here. There's also facts that we showed you earlier. The evidence in this case that plaintiffs relied on to invoke Basic in the first place showed that the stock would incorporate news so quickly so that it would be impossible for traders to trade on that information before it's reflected in the stock's price. There was no response to that principle from Mr. Browne and how that's compatible with this extra day space. And I think, frankly, it just isn't. And the reason that plaintiffs relied on that principle in order to invoke Basic is because Basic requires

it. The fundamental principle of Basic is that all publicly available news, material news, will be reflected in the stock's price whenever a trader or an investor trades on that information. And if you have these gaps in time, that just doesn't work. Basic would collapse. And so the plaintiff must, as the 11th circuit said, take the bitter with the sweet when they invoke that and it's factually supportable and supportable by lots of financial literature as well.

So on the August 9th, 2018 date, Mr. Browne said, well, in between July 3rd and August 9th there was a lot of time and we didn't -- you know. So we were saying we were still using the 12-inch pipe. And there's been no suggestion in this case, and it's implausible to suggest that anyone was surprised that after we said we were going to use this thing on July 3rd, that people had thought we had gone back to using the 20-inch. We weren't going to use it, and so this was new bad news. Because with no additional announcement, people thought that Energy Transfer had changed course back again to the 20-inch. And so it's just simply not new news for the purpose of evaluating price impact. And interestingly, Mr. Browne and the plaintiffs have never explained why if their theory is right, why wasn't there a price impact on July 3rd? They haven't done that. He's pooh-poohed the entire concept of looking at that, but I'm not sure from a statistical matter and our expert has put forth a lot of analysis on this, how

that makes any sense. If essentially the same corrective disclosure comes out, and it comes out for the first time, why would you not expect there to be a corrective -- a price impact then if there truly -- if this was truly price impactful news? And I think you would, and the lack of a price impact shows that there wasn't one.

So on the front end, same end, Mr. Browne mentioned that, well, he takes issue with our contention that Mr. Kaufmann denied that he had found front-end price impact or found that these statements has surprised the market. The court, of course, can look at these statements for themselves and see yes, you do, so I think they're fairly clear. But putting aside expert concession, or not, the statements themselves were not surprising, and there's no evidence that the market would have been surprised by the reiteration of the same disclosures, the same timeline six weeks later. And that undercuts any front-end price impact separate and apart from what any expert says.

And finally, on the October 29th piece that Mr. Browne talked about, he suggests that, well, Westlaw didn't publish it until October 30th. We can look into that. But perhaps somebody else did. It's dated October 29th. Well, both sides have had the opportunity to look for it. We looked for it; I assume the plaintiffs looked for it. Nobody found that evidence. So just the mere speculative possibility that

somebody published it is certainly not evidence that it was published, and we've both had an opportunity to identify that and put it in the record if it existed. I'm fairly certain it didn't exist, based on our search, and the fact that that organization is now defunct, you can't even ask them, and what DEP said in their certified copy of when they released the order. So I think all of the evidence there, again, just to reiterate my earlier point, supports the idea that there was no price impact -- or there was no news release on 10/29 and so that is not a corrective disclosure date. And so with that, I'll close, and I'm happy to take any questions.

THE COURT: I have a detail question, counsel. I mean, I've obviously tried to study the record in detail, but at the moment it escapes me whether the July 3rd communication, whatever it was, is part of the record. Was it a press account? How was that embodied, the transmission of that information? Is that already in the record?

MR. RITCHIE: Yes, that is in the record. It was, I believe, embodied, if memory serves, in a state impact article which is one of the articles plaintiffs -- one of the news outlets plaintiffs routinely rely on for public statements in this case, and I believe it is -- we've either just given the link in our expert report, or we provided it as an exhibit, I'm not sure which. But we certainly could provide the court with a link to that article, if it would like.

THE COURT: Yes, just for ease of reference, I think that would be helpful.

MR. RITCHIE: Sure.

THE COURT: And then I had said I would have a question for both sides at the end.

MR. BROWNE: Your Honor, could I make -- I am so sorry to interrupt you, I really am.

THE COURT: No, no problem.

MR. BROWNE: Okay. I just want to make one -- it takes a village, and some of my colleagues have asked me to make one additional point on the July 3rd article, and since you were just addressing that, may I make one --

THE COURT: Yes, of course.

MR. BROWNE: I believe when you look at the disclosure that they point to, I referenced that it's vague and not as specific, but what I meant by that is it's going to talk about the 12-inch pipe, the Frankenpipe concept. It's not going to capture the essential concept that was only learned on August 10th at the earliest by the market that this means that the capacity will be far less.

THE COURT: Right, well, and the reason I want to see the actual --

MR. BROWNE: Yes.

THE COURT: -- transmission is because, I mean, as I look at the back-and-forth during that timeframe, it does

appear to me that there is some inquiry being made of Energy Transfer. By one reading of some of the responses, it could seem that they were trying to minimize impact. And I think to the extent that we're looking at these windows and these effects, the nuance matters. And so I wanted to look at that in terms of the substance of it, and precisely how information is being communicated, that's all. Because, I mean, I do think it's a daunting task in cases like this to try to get your arms around the subtleness.

MR. BROWNE: I agree. And Your Honor, that's all I wanted to add, so I thank you for that.

MR. RITCHIE: We'll email that to your clerk this afternoon.

THE COURT: Yes. Both sides say this case is crystal clear and our view is right. Assume that it's not always as easy for the judge to get there and further assume that sometimes the famous philosopher, Mick Jagger, is right, you can't always get what you want. And if in this case the ruling were one that did not give each side all that they want, which means that -- and I haven't made any decisions, counsel, so nobody should start assuming anything, but I certainly have impressions based upon a lot of study here. And some of the disclosures were deemed not relevant for purposes of class certification, or not properly considered. What does that mean then in terms of models for loss causation

downstream? I mean, what would be the practical impact if I came out there? Let me start with plaintiffs, all right, and get their version a bit more.

MR. BROWNE: Yeah, Your Honor, this is something that I do live with in my cases and the practical impact of it can sometimes be quite unintended and quite negative for plaintiff's case, depending on which particular corrective disclosures are excluded at this point in time, because -- so, you know, for instance, if our -- I believe like if our last disclosure, the one that doesn't have statistical significance on any day, is excluded, that would probably be fairly minor impact on damages and sort of case coherency, for lack of a better word. But if certain disclosures are alleged to have no price impact, what defendants will then say is, well, that disclosure is very similar to this other disclosure and therefore, even though you only lost one or two in round one, it effectively means that everything is knocked out later.

So I guess I would sum up as succinctly as I can is it will have an impact on damages and case coherency if some of the statements are knocked out. That impact could range from perhaps very unintendedly negative to potentially not as important, depending on which statements are in and which statements are out. And I must say, I don't know right now which ones.

THE COURT: And I think conceptually you say if

we're good for one, we're good for all, and the defense says no, it doesn't work that way.

MR. BROWNE: Yeah.

THE COURT: So I'm -- and there's been some briefing on that as well.

MR. BROWNE: Yeah, I would -- there's definitely a sharp disagreement between the parties on that. I do think the better practice, partly for the reason that I just articulated, the law of unintended consequences, I do think the better practice is if there's strong evidence of price impact on many of the back-end disclosures or on the front-end context, the better practice is to proceed with allowing -- with finding that there is price impact and not making a statement-by-statement analysis of it now, both because I don't think it's required by the law, and we've pointed to some cases that have said that. I mean, even defendants distinguish some of our cases by saying, well, yeah, they let that go through because three or four of them had statistical significance that they just let it go through. So you will see in the case law that happening. So I think it's permissible, one. I'm not going to say it would be reversible error if you did cherry pick some statements, because I think the law is kind of -- there would be support for that in the law as well. But I do think the better practice is you don't -- sometimes you don't know what it means to strike something

down.

THE COURT: Well, one of the reasons for answering the question is we're looking at all the permutations here.

MR. BROWNE: Yeah, and it could be -- you know, you could -- you certainly -- and I've seen cases get close to trial where like the statements got knocked out earlier that really, as the evidence was amassed, should have probably stayed in and it can cause -- I keep using the word unintended consequences, maybe they're intended, but it can cause consequences on plaintiff's case, so --

THE COURT: My only intent is to get it right, so --

MR. BROWNE: I know that, I --

THE COURT: -- you're using your defenses.

MR. BROWNE: I absolutely do know that, and I think that -- I do think that in the service of getting it right now is -- weighs in the balance of if there is evidence of price impact Your Honor finds on many of the disclosures or statements, to leave them all in. That moves the ball more towards right. Because, remember, there's going to be a second chance to knock out corrective disclosure.

THE COURT: Oh, we're back on loss causation (indiscern.) --

MR. BROWNE: No, no ,no, I can't wait. I can't wait to get to this. All right, but that's my answer on that, Your Honor, unless you have any follow-ups.

THE COURT: That's fine.

MR. RITCHIE: So, Your Honor, yeah, we do disagree with that point of view, and so just to back up to the conceptual point of view, we think the weight of authority, just parsing the supreme court's cases as a first principle and the way they talk about price impact as relating to de-misrepresentation must have price impact, we don't think conceptually it makes sense that just because you have combined two separate types of statements into a single case that you should get price impact one for all. And I think the majority of cases that have considered this issue haven't done that, so we point out the Halliburton or Mann decision and others that have reached that result. Plaintiffs on their -- for their part point again to the Monroe County case in Georgia, so the traditional dispute --

THE COURT: Tastes great, less filling, you know? You're too young to have seen that commercial maybe.

MR. RITCHIE: No, no, I've seen it. So the -- in that case, though, it rests its ruling on this basis on an argument that it can't reach items that overlap with merits issues such as lost elevation, and following Goldman, that's simply just not a correct statement of the law anymore. And the other cases it cites it says are holding the same thing, so the only case it cites is Monroe, and they have these other cases that are supposedly doing the same thing. And so we

think those post-Goldman are no longer good law and that you should follow what we think the supreme court has been saying and do a statement-by-statement analysis of price impact -- or corrective disclosure by corrective disclosure analysis, and give a class certification order similar to the one that was done in the Halliburton or Mann decision if you were not going to go for us all the way, which of course we think you should.

As far as the practical implications, you know, Mr. Browne said, well, there could be some complications. I think ultimately those are secondary. I'm not sure exactly what he's referring to in any event, but it's similar to what happens at the motion to dismiss stage. If you haven't alleged that a statement was false or misleading or made a scienter, it gets thrown out of the case. You don't get to keep every statement in a case simply because you found one statement that was alleged to have been false or misleading and made a scienter. And that can, I'm sure, have ramifications for how plaintiffs were planning to proceed with their case if they get half of their statements thrown out. And no doubt, this might, too, but I don't think those practical considerations are controlling in how this decision should come out.

THE COURT: All right, counsel, thank you for excellent advocacy on behalf of your respective clients, and we'll continue pondering this.

MR. RITCHIE: Thank you, Your Honor.

MR. BROWNE: Thank you very much, Your Honor.

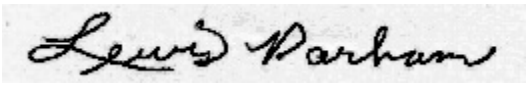
UNIDENTIFIED SPEAKER: Thank you, Your Honor.

THE COURT: I guess we're adjourned.

(Court adjourned)

CERTIFICATION

I, Lewis Parham, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



7/19/22

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